Nos. 86-179 and 86-401

IN THE

Supreme Court of the United States

October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et. al.*,

and

UNITED STATES OF AMERICA,

Appellants,

v.

CHRISTINE J. AMOS, *et. al.*,

Appellees.

On Appeal from the United States District Court for the District of Utah

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BRIEF OF THE AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICUS

The American Jewish Congress is an organization of American Jews founded in 1918. It has as its purpose the defense of the civil, political, economic and religious rights of American Jews, particularly the right to religious liberty. Because strict compliance with the Establishment Clause is an indispensible requirement for religious liberty, AJCongress has filed numerous briefs in cases arising under the Clause urging that government abide by its restraints.

In its view, however, the statute at issue here does not violate the Establishment Clause. While the Congress was not required to enact an exemption as broad as the one presently contained in §702, Congress nevertheless did not act unconstitutionally in enacting the broad

exemption that the District Court held unconstitutional. Because the decision below does not advance, but limits religious liberty by confining the permissible scope of accommodation to that mandated by the Free Exercise Clause, and by assigning too narrow a role to religion, AJCongress is filing this brief with the consent of the parties.

SUMMARY OF THE ARGUMENT

1. The District Court invalidated §702 as an establishment of religion on the ground that it aided religion, because it failed to observe the essential distinction between toleration of permitted discrimination and its sponsorship by government. If §702, in fact, required religious discrimination it would be unconstitutional. However, §702 does nothing of the sort, merely allowing private discrimination.

2. Statutes such as §702 having only an incidental effect of advancing religion are not unconstitutional. Because the discrimination sanctioned by §702 is the result of purely private decision-making, the presence of an independent decision-maker, as in Witters v. Washington, and Mueller v. Allen, dissipates the constitutional significance of the antecedent governmental action.

3. While the Establishment Clause is violated if uniquely government powers are conferred upon religious institutions, Larkin v. Grendels Den, §702 confers no such powers. The power to hire or fire, or set terms on conditions of employment is not a uniquely governmental power. This is particularly true of the federal government which is explicitly forbidden to discriminate on the basis of religion. Constitution Art. VI, §3.

4. That §702 repealed a narrower exemption does not change the result. Nothing in the Constitution prohibits the simple repeal of a civil rights statute, let alone an adjustment in its scope.

5. The Constitution prohibits not only the reality of government support for religion, but also the appearance of such support. However, in evaluating whether the appearance of endorsement exists, it is necessary to bear in mind the values

that the Free Exercise Clause protects. When measured against these twin values, §702 passes constitutional muster. The American political tradition recognizes that the quid pro quo of the ban on establishments of religion is the relative freedom of churches from regulation. Church exemptions are quite common in American law for just this reason.

6. The District Court, in evaluating whether the expanded §702 might be justified as necessary to protect the Free Exercise rights of religious institutions, looked to whether other secular institutions provided the same services. This was error, for courts may not thus set themselves up in judgment on the theology of religious institutions.

7. Social welfare institutions, such as Deseret Gymnasium, do in fact serve important religious purposes. They

demonstrate that religion has a role to play in all of life's activities, and they allow religious teachings to be transmitted other than by formal preaching. In addition, they foster a sense of community among believers. For all these reasons, voluntary religious social welfare institutions have always been an important element on the American religious scene.

8. By allowing such institutions to set their own employment standards, Congress recognized that adherence to common religious values could be helpful in creating a religious atmosphere necessary to carry out these community creating functions.

9. The District Court correctly found that §702 had a secular purpose. Adjusting the relationship between church and state to take into account the demands of the Free Exercise Clause is a secular purpose.

10. The District Court recognized that §702 minimized entanglement between church and state. However, because it found that the narrower exemption did not create excessive entanglement, it held that the 1972 amendment was nevertheless unconstitutional as being broader than necessary. In so doing, the lower court ignored this Court's teachings that the minimization of entanglement is a positive constitutional value, which argues in favor of the constitutionally broader rule.

11. Moreover, the District Court's analysis puts legislatures into a straight-jacket. In enacting statutes exempting religious institutions, they must either discern precisely the demands of the Free Exercise Clause or have their efforts invalided as establishments of religion. Such a test not only too severely restrains the operating latitude

of the legislature, but given the multiplicity of sects active in the United States, and their varied religious requirements would be impossible to meet.

12. Appellees are simply wrong when they assert that all exemptions are constitutionally suspect. While not every exemption is constitutional--and if §702 were to be applied to commercial establishments it would not be--such exemptions are a necessary and important part of our constitutional tradition. Exemptions which create religious gerrymander are also impermissible, but §702 is not vulnerable on this ground.

ARGUMENT

INTRODUCTION

Acts of Congress came before the courts clothed with a strong presumption of constitutionality, Rotsker v. Goldberg 453 U.S. 57, 64 (1981). The District Court here did not accord the exemption now contained in §702[1] of the 1964 Civil Rights Act, as amended, the benefit of that presumption.

The court below first determined that the earlier version of §702 was constitutional, and that Deseret Gymnasium did not qualify for exemption under it. Only then did it consider the expanded version of §702 holding that, contrary to the legislative

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1 Also at issue in this case is Utah Code Ann. §34-35-2(5)(1983) which wholly exempts religious institutions from Utah's anti-discrimination laws. This statute is constitutional at least to the extent that §702 is constitutional.

determination, it was unnecessary to protect the legitimate interests of religious institutions and that therefore the statute had the impermissible effect of advancing religion.[2]

This conclusion was, as a matter of law, erroneous. The absence of a coherent rationale for the result reached by the Court below in its opinion, or the opinions of the other courts which have considered the constitutionality of §702, suggests that the objections to this statute are not ones of constitutional law, but of public policy. The Congress is the proper forum for resolution of those claims.

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[2] Throughout this brief, the term "religious institutution" is used as a substitute for the statutory phrase "religious corporation, association, educational institution or society..."

I. THE REFUSAL TO BAN RELIGIOUS DISCRIMINATION DOES NOT ESTABLISH RELIGION

The District Court applied the three part test of Lemon v. Kurtzman, 403 U.S. 602 (1971) to §702 and concluded that the section, as amended in 1972, violated only the effect prong of that test. It concluded both that the broad exemption constituted governmental support for religious discrimination.

The essential error of the District Court was its failure to distinguish between discrimination commanded, enforced or actively encouraged by government, Estate of Thornton v. Caldor, 105 S.Ct. 2914 (1985); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970), or which is possible only because of the transfer of uniquely governmental powers to a private religious entity, Larkin v. Grendel's Den, 459 U.S. 116 (1981), on the one hand, and the mere toleration of

private discrimination on the other, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Adickes v. S.H. Kress & Co., supra, 398 U.S. at 166-67.[3]

Thus, the District Court remarked, paraphrasing Lemon v. Kurtzman, supra, 403 U.S. at 619 (1971), [74a][4] that "Congress must be certain, given the religion clauses, that by enacting an exemption it does not grant power to religious authorities to establish a religion..." (emphasis added). Likewise, it observed that, in enacting the expanded version of §702, "the government has given religious organizations the authorization to exercise...coercive power." (3a)

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[3] Indeed, private religious discrimination oft-times enjoys constitutional protection, Norwood v. Harrison, 413 U.S. 836 (1973).

[4] Unless otherwise noted, all citations are to the Appendix to the Jurisdictional Statement and are noted as ___a.

In a similar vein, the court below observed [67a] that invalidating the expanded version of §702 "keeps religious institutions from being permitted to burden the free exercise rights of nonmembers who seek employment in nonreligious jobs." Since the Free Exercise Clause does not regulate the affairs of private entities ex propio vigore, this conclusion must be based on the assumption that any discrimination permitted under §702 must be ascribed to government.

A. Private Discrimination Permitted Under §702 Is Not The Direct Result Of Governmental Action.

Section 702 itself neither encourages, commands, or endorses religious discrimination; it merely fails to ban it. Only statutes with a direct and immediate effect of advancing religion fail under the Establishment Clause, Lynch v. Donnelly, 104 S.Ct. 1335

(1984). "Not every law that confers an 'indirect,' 'remote' or 'incidental' benefit upon [religion] is for that reason alone, constitutionally invalid," Pearl v. Nyquist, 413 U.S. 756, 771 (1973). The employment decisions of which appellees complain are not the direct result of what Congress did when it expanded §702 to cover all employment by religious institutions; rather, the appellees complain of Deseret's private decisions, made in keeping with its own religious understanding and commitments.

Twice in the last five years, this Court has refused to find an impermissible effect in circumstances in which government funds flowed to religious institutions only as a result of voluntary private decision-making, Witters v. Washington, 106 S.Ct. 748, 752 (1986); Id. at 754 (Powell, J.,

concurring); Mueller v. Allen, 463 U.S. 388, 399 (1983). The presence of such intervening independent decision-making dissipates the constitutional significance of the antecedent governmental action.

Here, the government action is yet more benign, still further removed from, and no less independent of the actions of Deseret, than the subsidy of religious education upheld in Witters and Mueller; it consists solely of a refusal to outlaw certain employment decisions. This surely is not a "direct and immediate" advancement of religion.

Because §702 is permissive only, the distinction between §702 and Estate of Thornton v. Caldor Inc., supra, is evident. There, a Connecticut statute "decreed that those who observe a Sabbath...must be relieved of the duty to work on that day no matter what burden...

this imposes on the employer or fellow workers," 105 S.Ct. at 2917 (emphasis added). It was the state mandated compulsion to aid the religiously observant that led to the invalidation of that measure as having a direct and immediate effect of advancing religion.[5]

By contrast, §702 compels no religious institution to discriminate in employment. Any religious institution which wishes to hire truck drivers, building engineers, or, indeed, ministers of any or no faith may do so. Section 702 merely confirms the freedom of

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[5] Similarly, in Moose Lodge No. 107 v. Irvis, supra, this Court invalidated a regulation of the Pennsylvania Liquor Control Board as applied to a club with racially discriminatory guest policies. The regulation required private clubs holding liquor licenses to strictly enforce membership and guest rules. The effect of the rule was to require racial discrimination in violation of the Equal Protection Clause.

religious institutions which do wish to consider religion criteria in hiring to do so.

Appellees' contention that §702 empowers religious institutions to 'extort' contribution from employees, Motion to Dismiss at 17, is misconceived. Such contributions may be sought by some religious institutions as a condition of continued employment. Such 'extortion,' although it may be illegal under anti-kickback statutes, see, e.g., N.Y. Labor Law §198-b, cannot be attributed to the government by virtue of §702. Absent a direct nexus between the statute and the alleged religious 'coercion', the Constitution is not violated merely because §702 allows religious institutions to do what would be legal in the absence of the statute and illegal in the absence of the exemption.

B. That Congress Partially Repealed The Ban on Religious Discrimination Does Not Establish Religion

No different result is called for merely because between 1964 and 1972 Title VII banned religious discrimination by religious institutions in their 'secular' hiring. The mere repeal of an anti-discrimination statute is not an unconstitutional sanction of discrimination, and hence, in Establishment Clause terms, does not have a direct and immediate effect of advancing religion. Any other rule would "be destructive of a State's democratic processes and its ability to experiment," Crawford v. Bd. of Educ., 458 U.S. 527, 535 (1982).[6]

C. §702 Confers No Uniquely Governmental Powers on Religious Institutions

Because it is permissive only, and because religious discrimination is uniquely a non-governmental function,

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[6] Neither can section §702 be invalidated on the ground that it works a

§702 does not confer any uniquely governmental powers on religious institutions. Hiring decisions are, of course, not unique to religious institutions. They are inherent in the conduct of any corporation or organization.

In Larkin v. Grendel's Inn, supra, this Court considered a Massachussets statute which empowered churches to determine whether establishments within a certain radius could be licensed to serve liquor. Invalidating that statute, this Court repeatedly emphasized that the statute had delegated the uniquely

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fundamental reallocation of political power, cf. Washington v. Seattle School Dist. #1, 458 U.S. 457 (1982). Were §702 a constitutional provision creating unusual political obstacles to the securing of rights of minority groups, a different case would be presented. But §702 is ordinary legislation, repealable by simple majority vote of the legislature, and suffers from no such deficiency.

governmental power to issue liquor licenses to churches.[7]

A church veto of a liquor license is possible only because the state transfers a uniquely governmental power to a religious institution. By contrast, the action of a religious institution in hiring or firing employees does not depend on any non-existent grant of power embodied in §702.

Unlike traditional governmental powers, such as the power to punish criminals or to coin money, which are bestowed upon the federal government by the Constitution, the power to discriminate on the basis of religion in

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[7] "The churches power under the statute is standardless....That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors....We can assume that churches would act in good faith in their exercise of the statutory power ...yet [the statute] does not by its terms require that churches power be used in a religiously neutral way." 459 U.S. at 125. (emphasis added).

employment is the one form of discrimination forbidden to the Federal Government by the Constitution itself, Art VI, §3.

There is nothing uniquely governmental in the exemption in §702, and therefore nothing to invalidate under the Establishment Clause.[8]

II. SECTION §702 DOES NOT CREATE THE APPEARANCE OF GOVERNMENT SUPPORT FOR RELIGION

The Establishment Clause bans not only the reality of government support for religion, but the appearance of such support, Grand Rapids School Dist. v. Ball, 105 S.Ct. 3216, 3226 (1985); Wallace v. Jaffree, 105 S.Ct. 2479, 2503-05 (1985) (O'Connor, J., concurring); Lynch v. Donnelly, 104 S.Ct

[8] Deseret is not a company town, so as to call into play the rule of Marsh v. Alabama, U.S. 501 (1946); cf. State v. Celmer, 80 N.J. 405, 404 A.2d 1 (1979).

1355, 1367-69 (1984) (O'Connor, J., concurring); Larkin v. Grendel's Den, supra; Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 So.Cal.L.Rev. 450 (1986). It is therefore necessary to inquire whether, notwithstanding the fact that the expanded §702 confers no actual power on religious institutions, nor compels any institution to engage in religious discrimination, it is perceived as granting some impermissible special status to religion.

However, such an inquiry must take into account the fact that the Free Exercise Clause itself requires special treatment of religion, Wallace v. Jaffree, supra, 105 S.Ct. at 2504, (O'Connor, J., concurring), and that such treatment does not violate the Establishment Clause, Thomas v. Rev. Bd., 454 U.S. 707, 719-20 (1981).

Wallace v. Jaffree, supra, 105 S.Ct. at 2491, n.45, explains that a statute can be labelled an accommodation only if it removes a governmental barrier to the free exercise of religion. The silent prayer statute was not such a statute, for its intent was to affirmatively encourage students to pray--a quintessentially religious practice--not to remove a non-existent prohibition on student's voluntary prayer.

Section 702, by contrast, is an accommodation statute since it removes a substantial barrier to the autonomy of religious institutions--the right to determine who will be its employees and who will implement its religious purposes. Cf. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

As Justice O'Connor explained in Wallace v. Jaffree, supra, 105 S.Ct at 2504, the Establishment Clause inquiry

into a statute which attempts to accommodate religion must be somewhat different from the ordinary Establishment Clause inquiry:

> In assessing the effect of such a statute--that is, in determining whether the statute conveys the message of endorsement of religion...courts should assume that the "objective observer"...is acquainted with the Free Exercise Clause and the values it promotes.

The objective observer cannot conclude that, in broadening the §702 exemption, Congress endorsed religion. First, as noted above at p. 5, §702 "endorses" nothing; it merely permits certain private conduct.

Second, even if "endorsement" exists when religion is accorded unreasonably preferential treatment, no such treatment occurred here. Section 702 does not give religious institutions carte blanche to engage in prohibited discrimination,

placing them wholly outside of Title VII.[9] While religious institutions frequently practice, for example, sexual discrimination, §702 does not grant them absolution from the sex-bias prohibition of Title VII. Rather, Congress precisely targeted the exemption to the type of discrimination regarded by the public as within the prerogative of a religious institution-- religious discrimination-- and banned other forms of discrimination, reaffirming that religious institutions are not wholly above the law.

Section §702 does allow not-for-profit religious institutions to practice religious discrimination. Whether or not Congress could constitutionally ban all religious discrimination by religious

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[9] To the extent that this fact is relevant, the Utah statute at issue here may stand on a different footing from §702.

institutions,[10] the objective observer, knowledgable about the American tradition of separating church and state, would surely not be suprised that, in keeping with that tradition, government refused to regulate religious discrimination by religious institutions.

Nor would that objective observer assume that the message sent by §702 was

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[10] See generally, E.E.O.C. v. Freemont Christian School, 781 F.2d 1362 (9th Cir. 1986); Rayburn v. General Conference, 772 F.2d 1164 (4th Cir. 1985); E.E.O.C. v. Pacific Press Pub. Ass'n., 676 F.2d 1276 (9th Cir. 1982); E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980); Kings Garden, Inc. v. F.C.C., 498 F.2d 51 (D.C. Cir. 1974); Ninth & O Street Baptist Church, 616 F.Supp. 1231 (W.D. Ky. 1985); Feldstein v. Christian Science Monitor, 555 F.Supp. 974 (D.Mass. 1983); Russel v. Belmont College, 554 F.Supp. 667 (M.D. Tenn. 1982); Larsen v. Kirkam, 499 F.Supp 960 (D. Utah, 1980); Dolter v. Wahlert H.S., 483 F.Supp. 266 (N.D. Iowa, 1980); Whitney v. Greater N.Y. Corp, 401 F.Supp. 1363 (S.D. N.Y. 1975); Minn. ex rel McClure v. Sports & Health Complex, ___ Minn. __, 370 N.W.2d 844 (1985), app dismissed, ___U.S. ___ (1986).

that government approved of religious discrimination. That would in any event be an odd conclusion about a government whose charter forbids it to engage in religious discrimination. Rather, the observer would likely perceive such an exemption as the flip side of the "separation" coin. The quid pro quo for the ban on government aid is the right of the churches to be free of government regulation. No less a personage than Roger Williams shared this view, cf. M. DeWolfe Howe, The Garden and the Wilderness (1965). And Madison, in his Memorial and Remonstrance Against Religious Assessments, wrote "that in matters of religion, no man's right is abridged by the institution of civil society, and that Religion is wholly exempt from its cognizance." (emphasis added).

Statutory exemptions of churches from a variety of regulatory laws are a common and accepted aspect of American church-state relations. Thus, religious institutions are exempt from certain taxes, e.g., 26 U.S.C. 3309(b); (unemployment tax),[11] and, alone among non-profit groups, are exempt from certain tax reporting requirements, 26 U.S.C. §6033 (a)(2)(i).[12] See generally, Whelan, "Church" in the

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[11] Cf. Hollis Hills Jewish Center v. Roberts, 93 N.Y.A.D. 2d 1039, 461 N.Y.S. 2d 555 (3d Dep't 1983) (synagogue porter not covered by unemployment insurance).

[12] Although the IRS had attempted a narrow construction of the exemption to churches and church-like institutions, these efforts have so far been rebuffed by the lower federal courts which have construed the exemption to apply to social welfare institutions operated under religious auspices. Tennessee Baptist Children's Home v. U.S., ___ F.2d ___ (6th Cir. 1986); Lutheran Social Services v. U.S., 758 F.2d 1283 (8th Cir. 1985); Lutheran Childrens & Family Service of Eastern Pa. v. U.S., ___ F.Supp. (E.D. Pa. 1986).

Internal Revenue Code: The Definitional Problem, 45 Fordham L.Rev. 885 (1977).

This Court has construed the National Labor Relations Act not to apply to religious schools, N.L.R.B. v. Catholic Bishop, 440 U.S. 490 (1979). Most states, including Utah, exempt religious institutions from at least portions of their anti-discrimination laws, see, Dayton Christian Schools v. Ohio Civil Rights Comm'n., 766 F.2d 932, 941-42, n.18 (6th Cir. 1985), rev'd on other gds., 106 S.Ct. 2718 (1986) (collecting statutes).

Senator Ervin, quoted by the District Court at 26a-39a, sponsor of the legislation now under attack and himself a widely recognized expert on constitutional law, did not stray from the popular understanding of the limitations of government when he defended §702 as essential to maintain

the separation of church and state.

Separation is not a one way street, barring only aid to religion; it forbids the state to intrude upon the internal affairs of churches. Section 702 is wholly consistent with that understanding, and hence is not popularly understood as conveying a message that adherents of religion enjoy preferred status in the community.

III. THE DISTRICT COURT ACCORDED TOO NARROW A SCOPE TO THE FREE EXERCISE CLAUSE

The District Court found that government regulation of Deseret's "secular, non-religious activities" (54a) would not infringe on its Free Exercise Clause rights, that the exemption for secular employment contained in §702 was therefore far broader than necessary, and hence that it unconstitutionally established religion. It cited with approval [68a] the opinion of the

District of Columbia Circuit in Kings Garden Inc. v. F.C.C., supra, 498 F.2d at 57, in which that court suggested, but did not hold, that §702 was unconstitutional:

> It is conceivable that there are "many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all embracing secularism" ....But it hardly follows that the state may favor religious groups when they themselves choose to be submerged for profit or for power, in the 'all-embracing secularism' of the corporate economy. (emphasis in original)

Deseret Gymnasium, however, is not a profit-making or profit-seeking enterprise. Deseret was not incorporated as a for-profit business; it is, and always has been, an integral part of the not-for-profit Mormon Church. For several years, Deseret has operated at a loss and has been subsidized by appellants. [11a-18a].

Moreover the District Court committed a fundamental error of law in evaluating whether Deseret was a 'religious' corporation, association or society. It determined whether Deseret was secular by inquiring whether similar, but wholly non-religious, facilities exist. "Deseret offers the same facilities and services that are available in other gymnasiums, and the employees perform the same jobs that are performed at any public gymnasium or athletic club." [15a].

Policies that were instituted in keeping with appellants' religious beliefs were explained away by the District Court as equally consistent with secular health concerns as with religious precepts: "Deseret's no smoking rule is as consistent with the beliefs of athletics as it is with the beliefs of the Mormon Church." [15a].

The District Court thus improperly arrogated to itself the right to dismiss the religious motivations of the appellants. "[Men] may not be put to proof of their religious doctrines or beliefs." U.S. v. Ballard, 332 U.S. 78, 86 (1944). The comparative mode of analysis adopted by the District Court leads to the conclusion that the secular departments of parochial schools are secular, and may receive governmental aid because they teach the same courses, sometimes using the same books, as do the public schools, cf. Lemon v. Kurtzman, supra.

Appellants assert, and it appears sincerely, that they operate Deseret as a part of their religious mission. Deseret's "day was to begin with humble

prayers," to insure[13] "that whatever is done by way of exercise, training and recreation...will be done in the spirit of prayer and obedience of Thy commandments." Because Courts are not arbiters of scriptural interpretation, Thomas v. Rev. Bd., supra, 450 U.S. at 715-16, they must accept assertions of the religious nature[14] of an activity unless the "asserted claim is so bizarre,

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13 From the dedicatory prayer offered in 1911, cited by the District Court at 13a-14a.

14 Appellants operate profit-making businesses, but properly do not seek the benefits of §702 as to those businesses. See Defendant's Memorandum of Law in Opposition To The Plaintfiff's Motion for Summary Judgment, Defendants Statement of Fact Pursuant to (Local) Rule 5E at ¶D-13. See also In Re Application of Chronicle Broadcasting, Co., 59 F.C.C. 2d 335 (1976) (radio station owned by Mormon Church). A state provision similar to §702 was held inapplicable to a profit-seeking business in Minnesota ex rel. McClure v. Sports and Health Complex, ___ Minn. ___, 370 N.W. 2d 844 (1985).

so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause." Thomas v. Rev. Bd., supra, 450 U.S. at 717.

Before the Enlightenment took full hold, Western society was pervasively religious. Religious institutions either regulated or hosted all of life's important activities. The Enlightenment completed the process, perhaps begun

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But even if §702 does sweep so broadly as to include for-profit businesses, it does not follow that, as to such businesses, §702 would be constitutional, Roberts v. U.S. Jaycees, 104 S.Ct. 3244, 3251 (1984); Id. at 3258 (O'Connor, J., concurring). See generally, Forest Hills Early Learning Center v. Lukhard, 729 F.2d 230 (4th Cir. 1984), after remand, ___ F.2d __ (4th Cir. 1986); Tony and Susan Alamo Foundation v. Secretary of Labor, 105 S.Ct. 1953 (1985).

earlier, of carving out secular and sacred spheres.[15]

Change, of course, did not come all at once nor is the process total even yet. Voluntary association under religious auspices met, and may continue to meet many social needs in a society where religion and state are separate,[16] including education, social welfare, and (in institutions such as the YMCA, YMHA's or Jewish Community Centers) recreation.[17]

The tendency of modernity is to confine religion to the mosque, church or

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15 See, L.A. Cremin, American Education: The Colonial Experience (1970); S. Ahlstrom, A Religious History of the American People, ch. 22 (1972); R.T. Handy, A Christian America; Protestant Hopes and Historical Realities, p. 15-21 (2d ed. 1984).

16 S. Ahlstrom, A Religious History of the American People, supra, at 422-28, 742-43; R.T. Handy, A Christian America: Protestant Hopes and Historical Realities at 27-42; B.J. Coughlin, Church and State in Social Welfare (1965); P.W. McBride, Culture Clash: Immigrants and Reformers, ch. IV (1975).

synagogue. So confined, religion loses contact with the hurly-burly of the real world; to the degree religion is unrelated to all of life, it is at a serious disadvantage.

Institutions such as Jewish Community Centers or Deseret Gynmnasium demonstrate that even today religion has a relationship to all of life's activities. Such institutions allow religions to spread its teachings other than by formal preaching. Such institutions also help create a sense of community among believers, and illustrate the beauty of the "faith-community" to the non-believer. They therefore directly contribute to the advancement of faith.

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17 Solender, The Place of the Jewish Community Center in Jewish Life; R. Morris and M. Freund, Trends and Issues in Jewish Social Welfare in the United States (1966); D.I. MacLead, Building Character in the American Boy (1983) 261-64.

While many, perhaps most, faiths find it possible, indeed morally and religiously desirable, to fulfill these functions without engaging in widespread religious discrimination, others, including appellants, apparently believe that the sense of religious community, of common religious purpose, of striving towards common religious goals, and of commitment to common religious values, is necessary, or at least helpful, in creating a religious atmosphere so that otherwise mundane activities can be sanctified.[18]

The District Court [68a-69a] recognized that the Constitution permits,

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[18] In Grand Rapids School District v. Ball, supra, this Court indirectly recognized this. There, the Court invalidated a program in which the state paid for, inter alia, parochial school gym teachers to teach after school physical education courses on the ground that the teacher may "tailor the content of the [physical education] course to fit the school's announced goals."

and oft-times requires, exemption "to protect religious organizations from the burdens of secularism." School Bd. of Abington Twshp. v. Schempp, 374 U.S., 203, 306 (1963) (Goldberg and Harlan, concurring). Cf. Goldman v. Weinberger, 106 S.Ct. 1310, 1314 (1986) (Stevens, J., concurring). Section 702 is designed to insure precisely that an exemption is available to all groups who could be thought within its natural perimeters.

The District Court failed to recognize that its description of Deseret as a secular institution, and its view about the absence of a justification for a religous qualification for a building engineer, are products of the very 'pervasive secularism'--one of whose chief components is the elimination of irrational decision-making in employment--which the Constitution does

not tolerate as government policy. At a minimum, the religion clauses permit government to refuse to impose that pervasive secularism on religious institutions.

Yet another fundamental error of the District Court's closely tying the constitutionality of exemptions to the requirements of the Free Exercise Clause is that it creates a constitutional straight-jacket for legislatures: either limit religious exemptions to precisely what the Free Exercise Clause requires or transgress the Establishment Clause.

That analysis is inconsistent with America's constitutional tradition both because it unduly contracts the operating latitude of the legislature and because it does not work in a society where religious expression takes so many variegated forms that the legislature cannot predict in advance the impact a

statute will have on religious institutions. If not every accommodation is permissible, Estate of Thornton v. Caldor Inc., supra; Wisconsin v. Yoder, 406 U.S. 205, 221 (1972), it is nevertheless true that:

> [T]he limits of permissible state accommodation to religion are by no-means co-extensive with the non-interference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. (citations omitted).

Walz v. Tax Comm'n, supra, 397 U.S. at 669-70. Compare Braunfeld v. Brown, 366 U.S. 599, 608 (1961) (no Free Exercise Clause claim to exception from Sunday Blue Laws) with Arlans Dep't Store v. Ky., 371 U.S. 218 (1962) (states may grant such exemption without establishing religion).

There is thus no basis for appellees' contention, citing Yoder that "religious exemptions are constitutionally suspect."

Appellees' Motion to Affirm at 15. Appellees' citation to Wisconsin v. Yoder is puzzling, since that case emphasizes the importance of exemption in the American constitutional tradition.

That exemptions are not inherently suspect does not mean that every exemption is constitutional, Wisconsin v. Yoder, supra. An exemption which embodies a religious gerrymander does not pass constitutional muster, Larson v. Valente, 456 U.S. 228 (1982). The relevant inquiry was stated by Justice Harlan, concurring in Walsh v. United States, 398 U.S. 333, 357 (1970):

> The implementation of the neutrality principle of these cases requires..."an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that

> [all groups that] could be thought to fall within the natural perimeter [are included]." (citations omitted).

Section 702 meets this standard, notwithstanding the fact that its categorical exemption is not available to non-religious institutions. Congress could have concluded that it was unlikely that a non-religious institution would routinely have any legitimate interest in discriminating on the basis of religion, and relegating such institutions to the bona fide occupational qualification defense.

Appellees argue, Appellees' Motion to Affirm at 15, that the statute violates "a strong national policy to apply important federal labor laws, such as Title VII, to religious organizations absent a compelling First Amendment reason not to do so," and cites cases upholding Congress' decision to extend

partial Title VII coverage to religious institutions. The District Court made a similar argument [55a-57a].

There are two answers to this argument. First, Congress, not appellees or the District Court, is charged with assessing and setting national policies. It reasonably found that there is no compelling national policy in eliminating religious discrimination by religious emmployers, or at least, that another compelling national policy, that of religious freedom, outweighs the national fair employment policy. That determination involves assigning relative weights to each policy--a determination particularly within the competence of the democratic institutions of government.

Second, most forms of labor legislation are less intrusive than fair employment laws. Wage and hour laws, cf. Tony & Susan Alamo Foundation v.

Secretary of Labor, supra, or occupational safety laws, affect only the cost of employment, but do little to change the essence of the employer's business. Fair employment laws regulating who will act on behalf of a religious institution have a far greater impact on the institution's operations.

It is likely, perhaps even certain, that in its expanded form, §702 will in some cases stretch further than constitutionally necessary or desirable. But it is equally certain that the 1964 statute would have resulted in erroneous denials of exemption. Given the constitutional imperatives mandating the independence of religion from government, Congress could reasonably conclude that the risk of error should not fall on religious institutions.

All that is left of appellee's claim that all exemptions are unconstitutional

is that exemptions are available only to religious institutions, but not non-religious institutions. That form of preference is inherent in the text of a Constitution which singles out religion for special treatment. Wisconsin v. Yoder, supra, 406 U.S. at 215-16.

IV. SECTION 702 HAS A SECULAR PURPOSE

Although appellees contend that the 1972 amendment had a sectarian purpose, Motion to Dismiss at 10-15, the District Court correctly rejected that argument. While perhaps not required by the Free Exercise Clause, §702, by insuring the autonomy of religious institutions, and enabling them to create a miniature religious community, surely advances Free Exercise values. As Justice O'Connor suggested in Wallace v. Jaffree, supra, 105 S.Ct. at 2504, the Congressional purpose to advance Free Exercise values

is a substitute for, or more accurately is, a valid secular purpose.

This statute, unlike the silent prayer statute invalidated in Wallace v. Jaffree, is not a subtle legislative suggestion that religious discrimination is a good idea. Congress had, as the legislative history quoted above, p. 21, supra, suggests, no such intent; rather it had resolved only to leave the question of whether to discriminate to religious institutions. That is not an impermissible religious purpose.

V. THE MINIMIZATION OF ENTANGLEMENT IS AMPLE JUSTIFICATION FOR §702

The District Court acknowledged that the Free Exercise Clause requires that religious institutions be permitted to discriminate on the basis of religion in employment either where the entity teaches the "religious rituals or tenets" of the church [10a, 71a] or where the job

involves "the religious rituals or tenets of the religious organization or matters of church administration" [11a].

It acknowleged, moreover, that the expanded 1972 exemption minimized entanglement: [74a-75a]

> [t]he exemption was designed to minimize involvement and entanglement between church and state and to ensure that the government and courts do not go through the rigors of inspecting and analyzing whether the religious entity is engaging are religious or secular, thus avoiding an intimate and continuing relationship between church and state.

This finding led the District Court to conclude that the expanded §702 did not create undue and unconstitutional excessive entanglement. Id. However, the court also held that the narrower 1964 statute would not create undue entanglement and that such a statute would meet all the legitimate needs of religious institutions, [45a-52a]. The

court held that the 1964 exemption [10a-11a] required application of a complex, and difficult to comprehend, inquiry into: 1) corporate and financial structure; 2) the religious function of the employer; and 3) the religious nature of the job.

The District Court concluded that, since a narrow statute would adequately vindicate the Free Exercise Clause, and would not create the impermissible effect the District Court thought inhered in the enlarged §702, the less restrictive means test of the Establishment Clause, Larkin v. Grendel's Den, supra, 459 U.S. at 123; McGowan v. Md.; 366 U.S. 420, 499-50 (1961),[19] required it to strike the broader exemption.

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[19] The plurality in Lynch v. Donnelly, supra, 104 S.Ct. at 1363, n. 7, did, however, suggest in a cryptic note, the demise of the alternative means test in the Establishment Clause context.

The District Court's analysis is flawed in several respects. First, its conception of what constitutes the religious mission of a church is, as already noted, supra p. 26, fatally deficient and narrow. It is simply not true as either a matter of law or fact that, "the primary purpose of religious organization...is to carry on religious rituals, teach religion doctrines and proselytize." [71a]

Second, while the Court acknowledged that the 1972 amendments of §702 minimized entanglement between church and state, it failed to grasp the constitutional significance of that fact. Where government must choose between alternatives affecting religious institutions, its choice of one which minimizes entanglement is entitled to substantial deference because that choice

furthers important constitutional values.

The District Court was plainly correct in concluding that §702 as it presently stands minimizes entanglement. The record in this case belies any other conclusion. Among the original plaintiffs were employees of Beehive Industries, a church-owned garment factory, producing religious garments worn by devout Mormons.

The District Court concluded that "the record is not sufficient to form the basis for a ruling on the religious nature of Beehive or the job of the plaintiffs who were employed there [18a-19a). It accordingly ordered further discovery in at least six areas, many of which involved or touched upon religious matters [18a-19a]. That discovery produced evidence, including numerous internal church documents, and

affidavits from numerous church officials. In this way, a simple discrimination case turned into a sweeping investigation of Deseret's sponsoring church, its doctrines and activities.

In regard to yet another plaintiff (a truck driver employed by a church-operated sheltered workshop) the District Court concluded, after an extensive review of various church documents, that the employer was religious, and that the employee's position had religious implications and hence was exempt under the earlier version of §702 [108a-116a].

Congress could reasonably conclude that such inquiries into the activities of religious institutions were undesirable, if not unconstitutional, and that the federal courts should not be required, or allowed, to engage in such inquiries. Surely, it was reasonable for

Congress to conclude that a test which allows a religious institution to discriminate in the hiring of a truck driver, but not a building engineer, is not desirable.

The legislative history, recited by the District Court, [25a-39a], indicates that, indeed, minimizing entanglement was precisely Congress' concern. Senator Ervin, sponsor of the expanded version of §702, remarked (reprinted at 37a):

> I respectfully submit that we do not erect a wall of separation between church and state when we permit the agents of the state to tell a religious corporation, a religious association, a religious educational institution, or a religious society, whom it is to employ for any purpose, whom it is to promote for any purpose, or whom it may discharge for any reason.

This Court has at least twice noted that blanket treatment of religion advances Establishment Clause values. Walz v. Tax Comm'n, 397 U.S. 664, 674

(1970), upheld the constitutionality of a real estate tax exemption for religious institutions, without regard to whether they engaged in exempt social welfare activities:

> We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others....Churches vary substantially in the scope of such services; programs expand or contract according to resources and need....Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Conversely, in Bob Jones University v. U.S., 461 U.S. 574, 604, n.30 (1983), a case in which Congress extended a regulation to religious, as well as all other not-for-profit institutions, rather than make exemption dependent on a showing of religious motivation, this Court rejected an Establishment Clause challenge to a rule denying a religious

practicing religiously motivated racial discrimination a tax exemption in part because:

> the uniform application of the rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of a sincere religious belief.

The District Court attempted to avoid this analysis by noting that, unlike the situation in Walz, there was no long history of use of anti-discrimination laws to harass churches, as there was a history of doing so with tax laws. This was error. First, no such history was present in the Bob Jones case. Second, Walz does not turn on history, but on the policy of minimizing entanglements, Pearl v. Nyquist, supra, 413 U.S.at 794.

Moreover, the District Court's history is myopic. It is only recently that Congress and the state legislature passed comprehensive fair employment laws. Until then, religious institutions were free to (and did) discriminate. And when fair employment laws were ultimately enacted, they typically contained at least partial, and in the case of Utah, total exemptions for churches. There was, until recently, no possibility of using anti-discrimination laws to harass churches.

The expansion of §702 to encompass both religious and secular employment surely minimizes entaglement. The expansion furthers the "overriding interest in keeping the government--whether it be the legislature or the courts--"out of the business of evaluating the relative merits of different religious claims," Goldman v.

Weinberger, supra, 106 S.Ct. at 1316, n.6 (Stevens, J., concurring). It avoids seemingly irrational distinctions, such as that drawn below between a building engineer and a truck driver. Given the admitted need for at least some exemption for religious institutions, §702 ensures that all who should be able to invoke an exemption can do so.

CONCLUSION

Religious discrimination, like other forms of discrimination, has become an anachronism for most Americans. The secular ethic no longer will allow characteristics irrelevant to job performance to play a role in employment. Senator Harrison Williams, the leading Senator opponent of the 1972 amendment to §702, after alluding to possible Establishment Clause problems with the amendment, urged its rejection because "of all the institutions in this country

that should be setting the example of equal employment opportunity, if on that matter in all aspects of life, it is America's religious institution." 3 Legislative History of the Equal Employment Opportunity Act of 1972 at 1666.

The egalitarian principle of non-discrimination is well ingrained in secular thought, but is foreign to much religious thought. The mandatory application of Title VII's ban on religious discrimination to religious institutions, on the ground that exemption favors religion, would be an example of the "untutored devotion to the concept of neutrality which partake[s]... of a brooding and pervasive devotion to the secular and a passive, even active hostility to the religious," School Bd. of Abington Twshp v. Schempp, supra, 374 U.S. at 306 (Goldberg & Harlan,

concurring), which the Constitution condemns.

It is precisely Senator Williams' efforts to compel, allegedly in the name of non-establishment, churches to serve as models of a secular government endorsed policy, that the Congress rejected in enacting §702. That rejection embodies a recognition of the desire of some faiths to create a "total" environment. That is a difficult task. In enacting §702, Congress merely allowed religious institutions the opportunity to attempt to do so if they could.

For the reasons stated, the judgment must be reversed.

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